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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957.

**No. 555**

NORTHERN INDIANA PUBLIC SERVICE COMPANY,

*Petitioner*
*(Defendant-Appellant)*

*vs.*

HERLIHY MID-CONTINENT COMPANY,

*Respondent*
*(Plaintiff-Appellee).*

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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# INDEX.


| | PAGE |
|---|---|
| List of Authorities Cited | ii |
| Introduction | 1 |
| Restatement of the Case | 2 |
| Argument | 3 |
| The Court of Appeals has sanctioned a departure by the District Court far from the accepted and usual course of judicial proceedings | 3 |
| The Court of Appeals has decided important state questions in conflict with applicable state law | 5 |

## List of Authorities Cited.

### *Cases Cited.*

City of Chicago v. Greer (1870), 76 U. S. 726 19 L. Ed. 769 ..... 4

Douglass v. The County of Pike (1880), 101 U. S 677, 25 L. Ed. 968 ..... 5

Evans v. Koons (1894), 10 Ind. App. 600, 38 N. E. 55 .. 5

Freightways Inc. v. Stafford, 8 Cir. (1955), 217 F. 2d 831 ..... 4

Great Northern R. Co. v. Sunburst Oil Refining Co. (1932), 287 U. S. 358, 53 S. Ct. 145, 77 L. Ed. 360 .... 5

Gross Income Tax Div. v. Strauss (1948), 226 Ind. 329, 79 N. E. (2d) 103 ..... 5

Illinois Central v. Indianapolis Union P. Co., 7 Cir., 1925, 6 F. (2d) 830 ..... 7

J. D. Adams Mfg. Co. v. Storen (1938), 304 U. S. 307, 58 S. Ct. 913, 82 L. Ed. 1365 ..... 5, 6

Mann v. Schnarr (1950), 228 Ind. 654, 95 N. E. (2d) 138 6

Miles v. Dept. of Treasury (1935), 209 Ind. 172, 199 N. E. 372 ..... 5

Owen v. Fletcher Savings & Trust Bldg. Co. (1934), 99 Ind. App. 365, 189 N. E. 173 ..... 7

Shell Petroleum Corp. v. Earnest (1933), 97 Ind. App. 483, 187 N. E. 211 ..... 4

United States Glue Company v. Town of Oak Creek (1918), 247 U. S. 321, 38 S. Ct. 499, 62 L. Ed. 1135 ... 8

Wacker v. Essex (1918), 67 Ind. App. 584, 119 N. E. 466 4

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## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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## INTRODUCTION.

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Respondent's brief in opposition to the petition for writ of certiorari fails to show any distinction of legal significance between the instant case and the authorities relied on by petitioner. Indeed, there is none. Otherwise, respondent would certainly cite applicable cases to support the judgment.

## RESTATEMENT OF THE CASE.

The Restatement of the Case by respondent (Respondent's Brief, 3-6) supplies no omissions and corrects no inaccuracies in petitioner's statement. The inaccuracies are in the restatement itself. An example is respondent's claim that the statements[1] of its president were refuted by the testimony of respondent's certified public accountant (Respondent's Brief 5, Transcript 154-156). The record shows that the certified public accountant was never present when said declarations of the respondent's president were made (Transcript 154-156; 162).

A like inaccurate correction is the claim that the Indiana Gross Income Tax is the only state tax to which the contracts in question could have referred (Respondent's Brief, 4). This clearly ignores the fact that petitioner paid respondent's unemployment compensation and workmen's compensation tax, which were state taxes expressly mentioned in the contracts, and the fact that petitioner did not pay respondent's federal income tax any more than its state gross income tax, neither of which were mentioned in the contracts (Petition 5, Transcript 15-16) and neither of which were applicable to the work. The specious nature of the restatement is perhaps best proved by the failure of the respondent to rely on any of the matters therein in its argument.

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1. The statements of respondent's president were: "I know what the Indiana Gross Income Tax is, strike it off the bills, we will not bill them for it" (Petition 7, Transcript 181 and 182), and his reply to petitioner's purchasing agent's statement that there would be no income tax "that's right, but something has come up and I have changed my mind" (Petition 9, Transcript 213).

## ARGUMENT.

**1. The Court of Appeals has sanctioned a departure by the District Court which is so far from the accepted and usual course of judicial proceedings as to call for an exercise of the power of supervision of the Supreme Court of the United States.**

The merit of this proposition is well shown by the lack of substance in respondent's answer. First, respondent claims that the improper evidence was not offered to bind the petitioner (Respondent's Brief, 8-9). This attempt to seek the benefit of the prejudicial effect of inadmissible evidence and then deny responsibility for its admission is in itself a tacit admission of the lack of any legal theory on which the contracts of respondent with a stranger could afford an evidentiary basis to determine the rights of the instant parties under their contracts. Respondent fails to cite a single case to sustain the patently absurd proposition that it is a usual course of judicial proceedings to evade responsibility for admission of improper evidence and the prejudicial effect thereof by the statement that the evidence is not "binding."

Second, the respondent seeks to answer the petition by reliance on cases which cite well established rules that even though improper evidence is admitted a reversal is not required unless such evidence is prejudicial and, further, that in a trial without a jury the court is presumed to ignore incompetent evidence (Respondent's Brief, 10). However, in none of the cases cited by respondent did a trial court make a material finding of fact on incompetent evidence which was the only evidence in the record to support such a finding. Respondent does not challenge the statement that a careful search of the record will disclose

that there is no other evidence to support Finding of Fact No. 7 (Petition, 14). It is likewise unchallenged that a careful search of the record will fail to disclose a scintilla of evidence that petitioner had any notice or knowledge of either the execution or existence of respondent's contract with Chicago District Electric Generating Corporation, a stranger (Petition, 11). Where the sole issue in the litigation was whether petitioner was responsible under construction contracts for the construction of a generating station in Indiana to reimburse respondent for Indiana Gross Income Tax, evidence relied upon by the court that respondent had been paid the Indiana Gross Income Tax under a construction contract for the construction of a generating station in Indiana by a stranger, Chicago District Electric Generating Corporation, was clearly prejudicial.

It is difficult to conceive how the presumption that the trial court ignored this incompetent evidence could be more conclusively overcome than by its own finding of fact thereon (Petition, 14, 32; Transcript 331). There is no answer in the brief of the respondent to the fact that the very cases on which the Court of Appeals relied to affirm the judgment of the trial court show it to be reversible error for a trial court to give weight to incompetent evidence (Petition, 13, 23; 245 F. 2d 444). It is a manifest departure from the accepted and usual course of judicial proceeding to refuse relief where the presumption that the trial court has ignored incompetent evidence is overcome by its own findings, *Freightways, Inc.* v. *Stafford*, 8 Cir. (1955) 217 F. 2d 831, 837, particularly when the evidence was so clearly inadmissible and prejudicial, *City of Chicago* v. *Greer* (1870), 76 U. S. 726; 19 L. Ed. 769; *Shell Petroleum Corp.* v. *Earnest* (1933), 97 Ind. App. 483, 187 N. E. 211; *Wacker* v. *Essex* (1918), 67 Ind. App. 584, 119 N. E. 466.

**2. The Court of Appeals for the Seventh Circuit has decided important state questions in a way in conflict with applicable state law.**

Respondent has not challenged the proposition that the law of Indiana, including the judicial construction thereof, defining the nature and extent of the Indiana Gross Income Tax and the construction of the contracts between the parties is controlling. *Great Northern R. Co.* v. *Sunburst Oil Refining Co.* (1932), 287 U. S. 358, 53 S. Ct. 145, 77 L. Ed. 360; *Evans* v. *Koons* (1894), 10 Ind. App. 600, 38 N. E. 55; *Douglass* v. *The County of Pike* (1880), 101 U. S. 677, 25 L. Ed. 968.

(i) It is well established and unquestioned that the Indiana Gross Income Tax is not a tax upon work or performance of contracts nor is it an occupation or sales tax, nor is it a tax upon the transaction of business; it is simply a privilege tax upon the receipt of gross income. *J. D. Adams Mfg. Co.* v. *Storen* (1938), 304 U. S. 307, 58 S. Ct. 913, 82 L. Ed. 1365; *Miles* v. *Dept. of Treasury* (1935), 209 Ind. 172, 199 N. E. 372; *Gross Income Tax Div.* v. *Strauss* (1948), 226 Ind. 329, 79 N. E. (2d) 103.

The Court of Appeals correctly said "it is equally clear that we are dealing with a privilege tax upon the receipt of gross income" (245 Fed. 2d at page 443, Petition 25), but forthwith proceeded to disregard the rule. It is difficult to follow respondent's argument that the Court of Appeals did not construe the tax as a sort of occupation or sales tax attributable not to the receipt of gross income but to the work in light of its conclusion that:

> "Therefore 'state taxes • • • applicable to the Work • • •' quite clearly seem to have been intended by the parties to mean any state tax which was required to be borne in connection with or as a result of the performance of the entire contract. Hence, as plain-

tiff was required to advance the costs, which upon reimbursement were subjected to taxation under the Indiana law, *we conclude that the tax was directly attributable to and in fact, a part of the work,* namely, the entire performance of the contracts." (245 F. 2d at page 443, Petition at pages 15 and 25, emphasis added.)

The argument at page 12 of respondent's brief that the opinion relates to a construction of the contracts rather than of the tax is thus answered by the opinion itself.

(ii) *Mann* v. *Schnarr* (1950), 228 Ind. 654, 95 N. E. (2d) 138, holds that the Indiana Gross Income Tax is a direct tax upon the contractor and not an operating cost attributable to the work. The only answer by respondent is at page 13 of its brief where the claim is made that the case can have no bearing since the parties here included the tax in respondent's costs. This answer is on the unsound premise that private parties can by contract change the nature of a tax passed by a state legislature and the construction of that tax made by this court in *J. D. Adams Mfg. Co.* v. *Storen* (1938), 304 U. S. 307, 58 S. Ct. 913, 82 L. Ed. 1365, and by the Supreme Court of Indiana in *Mann* v. *Schnarr* (1950), 228 Ind. 654, 95 N. E. (2d) 138. Argument by parties to this litigation cannot alter the fact that the Supreme Court of Indiana has decided beyond theory or speculation that the Indiana Gross Income Tax is not an operating cost.

(iii) The Court of Appeals has ignored a well established and important rule of law that the burden of the payment of a tax is not shifted from the statutory taxpayer by contractual agreement except by express language and a clear and unmistakable intention to so shift the burden.

It is claimed that this is not a fair statement of the rule (Respondent's Brief, 14). That question is determined in *Owen* v. *Fletcher Savings & Trust Bldg. Co.* (1934), 99 Ind. App. 365 at 381, 189 N. E. 173 at 179:

> "Nowhere is an income tax expressly mentioned or referred to. If the parties contemplated or intended that the lessee should pay the income tax assessed against the lessor on rent received by her under the lease, such a condition could, and evidently would have been inserted in the lease by the use of a few simple, plain words, thereby eliminating any uncertainty. • • • To expand the meaning of the clause 'or which may be assessed upon the right of the lessor to receive the rentals hereunder during this lease' to include the payment of taxes upon the personal income of the lessor by the lessee, would require us to ignore the rules of construction which have been followed by the courts of other jurisdictions under like circumstances."

Respondent argues at page 15 of its brief that the cases of *Owen* v. *Fletcher Savings & Trust Bldg. Co.* (1934), 99 Ind. App. 365, 189 N. E. 173, and *Illinois Central* v. *Indianapolis Union P. Co.*, (7 Cir., 1925), 6 F. (2d) 830, are not applicable since they involved Federal Income Taxes. *Owen* v. *Fletcher Savings & Trust Bldg. Co.* (1934), 99 Ind. App. 365 at 375, 189 N. E. 173 at 177, answers this argument where it is said:

> "An income tax is distinguished from other forms of taxation in that it is not levied upon property nor upon the operation of a trade or business or subjects employed therein, nor upon the practice of a profession, the pursuit of a trade or calling, but upon the acquisitions of a tax payer arising from one or more of these sources or from all combined. It is not a tax on property and a tax on property does not embrace income. '*An income tax is an assessment upon the*

*income of the person and not upon any particular property from which that income is derived.'* ". (Emphasis added.)

It is the fact, that both taxes are income taxes, that is of legal significance, and not the fact that one is passed by the Congress of the United States and the other by the Legislature of the State of Indiana, or that one is a gross tax and the other is a net tax. It is thus abundantly clear that the Indiana Gross Income Tax is no more collectible by the respondent from the petitioner than is the Federal Income Tax which is admittedly uncollectible under the contracts in question.

The error in respondent's position arises from an attempt to interchange the phrase "performance of contracts" for the phrase "burden on interstate commerce." It is on this untenable premise that respondent would argue the applicability of the case of *United States Glue Company* v. *Town of Oak Creek*, 247 U. S. 321, 38 S. Ct. 499, 62 L. Ed. 1135. The question of shifting the burden for payment of a tax was not involved in that case in any way nor is there anything in the decision which is contrary to the well settled rule of law that the burden of payment of a tax is not shifted except by an express agreement.

## Conclusion.

The Court of Appeals for the Seventh Circuit having sanctioned so far a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the supervisory power of the Supreme Court of the United States, and having decided important state questions in conflict with the applicable state law, and the respondent having failed to give a meritorious answer to the petition herein and having failed to show authority in support of said decision, petitioner respectfully urges that a writ of certiorari issue to the Court of Appeals for the Seventh Circuit and that, upon review, the decision of the Court of Appeals be reversed.

Respectfully submitted,

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